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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090



**U.S. Citizenship
and Immigration
Services**

E₂

Date: **NOV 10 2011**

Office: DALLAS, TX

File: [REDACTED]

IN RE: [REDACTED]

APPLICATION: Application for Certificate of Citizenship under former section 321 of the Immigration and Nationality Act, 8 U.S.C. § 1432

ON BEHALF OF APPLICANT:

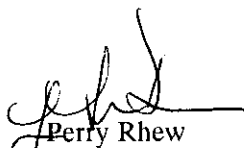
[REDACTED]

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$630. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,


Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The Application for Certificate of Citizenship (Form N-600) was denied by the Field Office Director, Dallas, Texas, and the Administrative Appeals Office (AAO) rejected the appeal; however, the AAO will reopen the applicant's case *sua sponte*. The appeal will be dismissed.

On August 15, 2011, the AAO rejected the applicant's appeal as untimely filed based on a receipt date of February 8, 2011. Evidence has since been submitted by the applicant's agent that establishes that the appeal was timely filed and received by U.S. Citizenship and Immigration Services (USCIS) on February 3, 2011. The AAO therefore reopens the applicant's case *sua sponte*.

The record reflects that the applicant was born in Canada on July 24, 1965. The applicant's father became a naturalized U.S. citizen on September 20, 1977. The applicant's mother was born in Canada, and is not a U.S. citizen. The applicant was admitted to the United States as a lawful permanent resident on May 26, 1969.¹ The applicant seeks a Certificate of Citizenship under former section 321 of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1432, claiming that he derived citizenship through his father.

The director determined that the applicant failed to establish eligibility for derivative citizenship under former section 321 of the Act, and denied the application accordingly. *See Decision of the Field Office Director*, dated May 6, 2010. On appeal, the applicant's agent contends that the applicant's parents were legally married at the time of the applicant's birth, legally separated at the time the applicant's father naturalized and the applicant entered the United States as a lawful permanent resident. *See Agent's Letter*, dated August 22, 2011.

Because the applicant was born abroad, he is presumed to be an alien and bears the burden of establishing his claim to U.S. citizenship by a preponderance of credible evidence. *See Matter of Baires-Larios*, 24 I&N Dec. 467, 468 (BIA 2008). The applicable law for derivative citizenship purposes is the law in effect at the time the critical events giving rise to eligibility occurred. *See Minasyan v. Gonzales*, 401 F.3d 1069, 1075 (9th Cir. 2005); *accord Jordon v. Attorney General*, 424 F.3d 320, 328 (3d Cir. 2005). Former section 321 of the Act is therefore applicable in this case.

Former section 321(a) of the Act provided, in pertinent part:

A child born outside of the United States of alien parents . . . becomes a citizen of the United States upon fulfillment of the following conditions:

- (1) The naturalization of both parents; or
- (2) The naturalization of the surviving parent if one of the parents is deceased; or
- (3) The naturalization of the parent having legal custody of the child when there has been a legal separation of the parents or the naturalization of the

¹ The applicant's lawful permanent resident status was terminated and he was ordered removed from the United States on July 15, 2008.

mother if the child was born out of wedlock and the paternity of the child has not been established by legitimation; and if

(4) Such naturalization takes place while such child is unmarried and under the age of eighteen years; and

(5) Such child is residing in the United States pursuant to a lawful admission for permanent residence at the time of the naturalization of the parent last naturalized under clause (1) of this subsection, or the parent naturalized under clause (2) or (3) of this subsection, or thereafter begins to reside permanently in the United States while under the age of eighteen years.

The order in which the requirements are fulfilled is irrelevant, as long as all requirements are satisfied before the applicant's 18th birthday. *Matter of Baires-Larios*, 24 I&N Dec. at 470.

The term legal separation means "either a limited or absolute divorce obtained through judicial proceedings." *Afeta v. Gonzales*, 467 F.3d 402, 406 (4th Cir. 2006) (affirming the Board of Immigration Appeals' construction of the term legal separation as set forth in *Matter of H*, 3 I&N Dec. 742, 744 (BIA 1949)) (internal quotation marks omitted); *see also Minasyan v. Gonzales*, 401 F.3d at 1076 (stating that term legal separation refers to a separation recognized by law; considering the law of California, which had jurisdiction over the applicant's parents' marriage).

On appeal, the applicant's agent contends that the applicant qualifies for derivative citizenship based on the naturalization of his father, the parent having legal custody when there has been a legal separation of the parents.

Here, the applicant satisfied several of the requirements for derivative citizenship set forth in former section 321(a) of the Act before his eighteenth birthday. Specifically, the applicant was admitted to the United States as a lawful permanent resident when he was three years old, and the applicant's father became a naturalized U.S. citizen when he was twelve years old. However, the applicant has not shown that his parents were legally married or legally separated while he was under the age of 18 years, as required by former section 321(a)(3) of the Act.

On appeal, the applicant's agent contends that the affidavits in the record establish that the applicant's parents entered into a common law marriage, which is recognized by Ontario, in 1963, and then legally separated in 1972. The record contains a Birth Certificate indicating that the applicant's birth was registered with the [REDACTED], on July 25, 1965 and reflects the applicant's father's name. The record contains affidavits, dated December 11, 2008, and January 27, 2011, from the applicant's mother indicating that the applicant's mother entered into a common law relationship with the applicant's father in 1963. The applicant's mother's affidavit also indicates that the relationship was dissolved in October 1972. These documents are not evidence of a legal marriage or of a limited or absolute divorce obtained through legal proceedings in Ontario, Canada. In Canada the legal definition and regulation of common law marriage falls under the jurisdiction of the provinces. The province of Ontario did not have a legal definition or regulation of common law marriage until it

passed the Ontario Family Law Reform Act of 1978.² As such, the applicant was born out-of-wedlock in 1965 and the applicant's parents' relationship terminated prior to the passage of laws governing common law marriage.

Even though the applicant was born out-of-wedlock he was legitimated under Canadian law with the passage of the Ontario Children's Law Reform Act in 1979, which abolished the common-law distinction between children born in wedlock and those born out-of-wedlock. The Children's Law Reform Act was retroactive to those born prior to its enactment. A child born out-of-wedlock is therefore placed in the same legal position as one born in wedlock once the child is legitimated. The applicant has failed to provide evidence of a legal separation. While the Ontario Family Law Reform Act of 1978 recognized verbal agreements to separate in common law marriages, it required that such a separation may only be legally enforceable if it was dissolved through a legal agreement which is required to be in writing and witnessed or through an application to a court. *See Ontario Family Law Reform Act of 1978; Ontario Family Law Act 1986; and Ontario Family Law Act 1990.* The applicant has failed to provide any such documentation and the record clearly reflects that the applicant's parents' relationship was one based on verbal agreements. Consequently, the applicant did not derive citizenship through his father under former section 321(a)(3) of the Act. The applicant is also ineligible to derive citizenship under any other subsection of former section 321(a) of the Act.

The applicant bears the burden of proof to establish his eligibility for citizenship under the Act. Section 341 of the Act, 8 U.S.C. § 1452; 8 C.F.R. § 341.2(c). Here, the applicant has not established that he met all of the conditions for the automatic derivation of U.S. citizenship pursuant to former section 321 of the Act before his eighteenth birthday. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.

² Moreover, Ontario law does not classify a common law marriage as a "marriage" and does not afford the same rights and obligations as it does to marriages.